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No.

In the

Supreme Court of the United States

OCTOBER TERM, 1971

In the Matter of the Last Will and Testament of Mary S. Allis, Deceased:

PAUL M. KUDER and
ELIZABETH A. BRAITHWAITE,
Trust Remaindermen,

Petitioners,

-vs-

FIRST WISCONSIN TRUST COMPANY,
Trustee,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	3
Constitutional Provision Involved	3
Statement of the Case	3
Reasons for Granting the Writ	8
Conclusion	13
Appendix - Opinion and Judgment Below	1a-8a

CITATIONS

Cases:

Baldwin v. Hale, 1 Wall 223	9
Boddie v. Connecticut, 401 US 371	9, 12
Grannis v. Ordean, 234 US 385	12
Hovey v. Elliott, 167 US 409	9
Mullane v. Central Hanover Bank & Trust Co., 339 US 306	10, 12
Windsor v. McVeigh, 93 US 274	9

Statute:
28 U.S.C. Section 1257 (3) 2

U.S. Constitution:
Fourteenth Amendment, Section 1, Clause 2. 3

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Petitioners-remaindermen, Paul M. Kuder and Elizabeth A. Braithwaite, pray that a Writ of Certiorari issue to review the decision of the Supreme Court of the State of Wisconsin, entered May 4, 1971, affirming the trial court's order of dismissal of petitioners'-remaindermen's order to show cause why an order should not be made vacating and reopening the final decree and judgment in the above estate for the purpose of trial and determination with respect

to damages sustained by said Paul M. Kuder and said Elizabeth A. Braithwaite as the result of fraudulent and condemnable collusive actions and conduct of the First Wisconsin Trust Company as Trustee of the testamentary trust established by the Will of Mary S. Allis; further, why all orders approving and allowing annual accounts of the Trustee and the order discharging the Trustee should not be vacated and set aside.

OPINIONS BELOW

The opinion below of the Supreme Court of the State of Wisconsin is reported in 51 Wis. 2d 189 and appended hereto as Appendix.

JURISDICTION

The decision of the Supreme Court of the State of Wisconsin affirming the order of the trial court dismissing petitioners'-remaindermen's order to show cause why an order should not be made vacating and reopening the final decree and judgment in the above estate for the purpose of trial and determination with respect to damages sustained by said Paul M. Kuder and said Elizabeth A. Braithwaite as the result of fraudulent and condemnable collusive actions and conduct of the First Wisconsin Trust Company as Trustee of the testamentary trust established by the Will of Mary S. Allis; further, why all orders approving and allowing annual accounts of the Trustee and the order discharging the Trustee should not be vacated and set aside. Said decision was entered on May 4, 1971. The statutory provision conferring jurisdiction on this Court is 28 U.S.C. Sec. 1257 (3).

QUESTION PRESENTED

Whether a Court may, consistent with the due process of law required by the Fourteenth Amendment to the United States Constitution, enter an order dismissing an order to show cause of trust remaindermen seeking the vacation and reopening of all orders and the final decree and judgment approving annual and final accounts and discharging the Trustee of a trust on grounds of fraudulent and condemnable collusive actions and conduct on the part of the Trustee, without ever having permitted petitioners the opportunity to be heard on the merits of their allegations together with the opportunity to call witnesses and take testimony.

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV, United States Constitution, Section 1, Clause 2: ", . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . "

STATEMENT OF THE CASE

Mary S. Allis died on December 17, 1923. Under the provisions of her Will, (R. 2-4) most of her estate was placed in trust, with income to her daughter Elizabeth Allis Kuder Sawyer for life, and the remainder to her daughter's children, petitioners-remaindermen Paul M. Kuder and Elizabeth A. Braithwaite. The Will named the Respondent First Wisconsin Trust Company as Executor and Trustee, and Respondent duly accepted the duties and obligations as said Executor and Trustee of the estate. As Executor,

the First Wisconsin Trust Company transferred to itself as Trustee, real estate and personal property appraised at $255,076.28 in an inventory of assets dated May 26, 1927.

The life tenant of the trust, Elizabeth Allis Kuder Sawyer, died on May 20, 1965, and shortly thereafter, on July 8, 1965, Respondent petitioned the Milwaukee County Court in Probate for the approval and allowance of the final accounts and for the termination of the trust and discharge of the Trustee. On August 4, 1965, the County Court, at an ex parte proceeding, ordered the remaining accounts approved and allowed, the trust terminated, and the Trustee discharged. The trust was closed and the Trustee discharged on November 15, 1965. The Will prohibited invasion of the corpus of the trust (R. 2-4), and although the estate was valued at $255,076.28 in 1927, the value of the trust upon termination in 1965 was placed at $239,236.03. In view of the economic history of the United States between 1927 and 1965, petitioners-remaindermen were shocked by the decrease in size of the estate.

Answers and explanations were immediately sought from the Trustee-Respondent which, contrary to its many promises, eventually refused to disclose its records and activities with respect to its treatment and disposition of estate assets.

On May 21, 1968, petitioners-remaindermen procured an order requiring Respondent-Trustee to appear and show cause why an order should not be made vacating and reopening the final decree and judgment approving the final accounts

and discharging the Trustee of the trust established by the Will of Mary S. Allis for the express purpose of trial and determination with respect to damages sustained by petitioners-remaindermen, Paul M. Kuder and Elizabeth A. Braithwaite, as the result of fraudulent and condemnable collusive actions and conduct of Respondent First Wisconsin Trust Company; further, why all orders approving and allowing annual accounts of the Trustee and the orders discharging the Trustee should not be vacated and set aside.

Subsequent to the service of the aforesaid Order to Show Cause, Trustee-Respondent First Wisconsin Trust Company sought to prevent examination into its conduct through a motion requesting alternative relief: (A) that the Court immediately dismiss in its entirety the instant proceedings on the ground that Appellants are barred by their laches from the relief sought, or (B) that certain paragraphs be stricken from the duces tecum portion of subpoenas served upon certain officers of the First Wisconsin Trust Company (R. 87-97).

Petitioners-remaindermen sought a full and complete hearing on the merits of their allegations for the express purpose of vacating the aforesaid decree and judgment and for a full and complete trial on the merits with respect to damages sustained by said petitioners as the result of fraudulent and condemnable collusive conduct on the part of Respondent-Trustee, said hearing being their absolute Constitutional right.

Contrary to the due process of law required by the Fourteenth Amendment to the United States

Constitution, the trial court denied and refused to permit petitioners to call any witnesses or take any testimony, and, summarily, without any testimony or review of the merits, executed its order dated February 11, 1969, dismissing petitioners' Order to Show Cause on the grounds of laches and on the further erroneous ground that the supporting affidavit failed to allege that Trustee-Respondent committed a fraud upon the Court.

On April 30, 1969, petitioners-remaindermen served notice of appeal to the Wisconsin Supreme Court, the same having been dismissed on the ground that it was not taken within the time prescribed by law.

On November 14, 1969, the trial court issued its order denying petitioners-remaindermen permission to appeal its order of February 11, 1969.

On January 21, 1970, petitioners-remaindermen procured an Order to Show Cause (R. 115-116) which directed Respondent-Trustee to show cause why the final decree and judgment should not be vacated and reopened and why all orders approving accounts and discharging the Trustee should not be vacated. This motion sought a full and complete hearing on the merits for the express purpose of vacating the aforesaid orders, decree and judgment and for a full and complete trial on the merits with respect to damages sustained by petitioners-remaindermen as the result of fraudulent and condemnable collusive conduct on the part of the Respondent-Trustee. A full and complete hearing on the merits of petitioners-remaindermen's allegations was and is their

absolute Constitutional right. The affidavit of petitioners-remaindermen in support of this Order to Show Cause contains matters and allegations alleging that the order dismissing the original Order to Show Cause was procured by fraud upon the court (R. 120-125, 145-146). This second Order to Show Cause was dismissed by the trial court on June 30, 1970, (R. 206-208) on the ground that dismissal of the previous Order to Show Cause, even though testimony and evidence were denied and precluded by the Court, constituted res judicata as to the second petition. Petitioners-remaindermen appealed the June 30, 1970, order of the trial court to the Wisconsin Supreme Court.

In rendering its decision on appeal, the Wisconsin Supreme Court held (Petitioners' App. 1-8) that language contained in the trial court's decision and order of June 30, 1970, constituted a determination that the order dismissing the first Order to Show Cause was not procured by fraud upon the Court as alleged in petitioners' second Order to Show Cause, and that any further attempted appeal would be an attempt to appeal from the order dismissing the first Order to Show Cause, which appeal was heretofore dismissed as being untimely, and therefore the order dismissing the second Order to Show Cause is not appealable.

Petitioners-remaindermen have raised a substantial Federal question at every level and stage of their proceedings. All that petitioners-remaindermen have ever sought is the opportunity for a full and fair hearing on their allegations with the opportunity to be heard and to call

witnesses and take testimony thereof. Petitioners-remaindermen sought a full and complete hearing in their first Order to Show Cause (R. 16-17) and were denied their Constitutional right to a hearing on the merits by the court's summary decision and order of February 11, 1969. Petitioners-remaindermen procured their second Order to Show Cuase wherein they sought a full and complete hearing on the merits of their allegations, and once again were precluded by the trial court and by the highest court of Wisconsin, the Wisconsin Supreme Court, from a full and fair hearing on the merits of their allegations.

The Supreme Court of the State of Wisconsin did not expressly pass upon the Constitutional issue that petitioners-remaindermen were denied the opportunity to be heard and for a full and complete hearing on the merits of their allegations, but they could not have affirmed the order below without resolving the Constitutional question against the petitioners.

Petitioners seek review of the affirmance of the order dismissing petitioners' second Order to Show Cause and for the opportunity to be heard with respect to the allegations contained in said petition, second Order to Show Cause.

REASONS FOR GRANTING THE WRIT

1. Dismissal of petitioners'-remaindermen's second Order to Show Cause without having ever permitted a full and complete hearing on the merits of the allegations is a violation of the due process of law required by the Fourteenth Amendment to the United States Constitution.

This Court stated in the recent case of Boddie v. Connecticut, (1971) 401 US 371, 91 S. Ct. 780, 28 L.Ed. 2d 113 at page 377:

> "Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that '(w)herever one is assailed in his person or his property, there he may defend,' Windsor v. McVeigh, 93 US 274, 277, 23 L Ed 914, 915 (1876). See Baldwin v. Hale, 1 Wall 223, 17 L Ed 531 (1863); Hovey v. Elliott, 167 US 409, 42 L Ed 215, 17 S Ct 841 (1897)."

2. Petitioners-remaindermen brought a motion, Order to Show Cause, why an order should not be made vacating and reopening the final decree, judgment and all orders approving the final accounts and discharging the Trustee, Respondent, of the trust established by the Will of Mary S. Allis, with the sole object of said motion being a hearing on the merits of petitioners'-remaindermen's allegations of fraudulent and condemnable collusive conduct and action on the part of the Respondent-Trustee.

Petiioners were summarily denied a hearing on the merits of their allegations, and an order of dismissal of said first motion on the grounds of laches was entered, without ever having taken testimony or permitting a hearing on the merits

of petitioners'-remaindermen's allegations. Petitioners-remaindermen brought a second motion, Order to Show Cause, seeking the same relief, a hearing on the merits of their allegations of fraudulent and condemnable collusive actions on the part of the Respondent-Trustee, and, in addition, alleging fraud on part of the Respondent-Trustee, and, in addition, alleging fraud on part of the Respondent-Trustee in procuring the order of dismissal of petitioners'-remaindermen's first motion. This second motion was likewise summarily dismissed by the trial court. Grounds for dismissal by the trial court were that its order dismissing the first motion was res judicata as to the second. The Supreme Court of the State of Wisconsin held that the order dismissing the first motion was not res judicata as to the second; however, it further found that there was no fraud upon the trial court by Respondent-Trustee in procuring the order dismissing the first motion, and that therefore any appeal of the second motion constituted an attempt to appeal from the order dismissing the first motion, all without any testimony or evidence being allowed. It is unthinkable to state that there was no fraud without ever having had a hearing on the merits of the allegations of fraud. It is a violation of the due process of law required by the Fourteenth Amendment to the United States Constitution and a denial of due process. In Mullane v. Central Hanover Bank & Trust Co., 339 US 306, 70 S Ct 652, 94 L Ed 865 (1950), this court stated:

> "It is sufficient to observe that, whatever the technical definition of its chosen procedure, the interest of each state in providing

> means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard." Id., 313.

Petitioners-remaindermen have effectively been denied a full opportunity to appear and be heard through the events occurring below.

> "Quite different from the question of a state's power to discharge trustees is that of the opportunity it must give beneficiaries to contest. Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.
>
> "In two ways this proceeding does or may deprive beneficiaries of property. It may cut off their rights to have the trustee answer for negligent or illegal impairments of their interests. Also, their interests are presumably subject to diminution in the proceeding by allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest. Certainly the proceeding is one in which they may

be deprived of property rights and hence notice and hearing must measure up to the standards of due process." Id., 313.

3. To deny petitioners-remaindermen their day in court and the opportunity to testify and call witnesses and produce evidence in support of their allegations is a violation of the due process provision of the Fourteenth Amendment to the United States Constitution. This Court stated in Mullane v. Central Hanover Bank & Trust Co., supra:

> "Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment. This is defined by our holding that 'The fundamental requisite of due process of law is the opportunity to be heard.' Grannis v. Ordean, 234 US 385, 394, 58 L ed 1363, 1368, 34 S Ct 779." Id., 314.

4. To render a decision and order adverse to the interests of a party without ever having granted said party a full and complete hearing constitutes a violation of the due process provision of the Fourteenth Amendment to the United States Constitution and a rejection of the substantive and procedural due process of law. See Boddie v. Connecticut, 401 US 371, 91 S Ct 780, 28 L.Ed. 2d 113. Mullane v. Central Hanover Bank & Trust Co., 339 US 306, 70 S Ct 652, 94 L.Ed. 865 (1950).

5. To render an order of dismissal to a motion based on allegations of fraud, and to state as a ground for such dismissal that there was

no fraud without ever having had a hearing on the merits of said fraudulent allegations is a violation of due process of law.

CONCLUSION

This Court should grant certiorari, and the judgment below should be reversed and remanded with instructions to allow a full and complete hearing on the merits.

Respectfully submitted,

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INDEX TO APPENDIX

	Page
Decision of the Supreme Court of the State of Wisconsin entered May 4, 1971	1a-8a

APPENDIX

No. 264

August Term, 1970

STATE OF WISCONSIN IN SUPREME COURT

In re Last Will and Testament of Mary S. Allis, Decd.:

PAUL M. KUDER et al., Trust Remaindermen,

Appellants,

v.

FIRST WISCONSIN TRUST CO., Trustee,

Respondent.

APPEAL from an order of the county court of Milwaukee county: WILLIAM J. SHAUGHNESSY, County Judge. Affirmed.

This is an appeal from an order of the county court dismissing appellants' order to show cause why the final decree and judgment approving the final accounts and discharging the trustee of the trust established by the will of Mary S. Allis should not be vacated and reopened.

CONNOR T. HANSEN, J. Mary S. Allis died on December 17, 1923, and by her will left the residue of her estate in trust, with income to her daughter Elizabeth Allis Kuder, for life; and the remainder to her daughter's children, Paul M. Kuder and Elizabeth A. Braithwaite, the appellants in this action. The will names the First Wisconsin Trust Company, respondent herein, as executor and trustee. Appellants became twenty-one years of age on September 21, 1938, and February 24, 1940, respectively.

Elizabeth Allis Kuder Sawyer, the life beneficiary of the trust, died on May 20, 1965. Shortly thereafter, the court approved the account of the trustee and directed distribution of the trust assets to the remaindermen, the appellants in this appeal, and the termination of the trust. Following the distribution of the trust assets and on November 15, 1965, the court entered an order terminating the trust and discharging the trustee from further liability. All of these proceedings were had pursuant to due notice to the appellants.

It also appears that orders approving the accounts of the trustee for successive periods were entered on November 26, 1946, June 22, 1953, and September 11, 1962, after due notice to the appellants as remaindermen, and a hearing thereon, and that on at least one occasion one of the remaindermen appeared with counsel.

On May 21, 1968, three years after their mother's death and approximately two and one-half years after the trust had been terminated and the trustee discharged, the appellants procured an order requiring the trustee to show cause why the

final decree and judgment in the estate should not be vacated and reopened, and why the order approving the accounts and discharging the trustee should not be vacated. The order to show cause was supported by an affidavit alleging fraudulent conduct on the part of the trustee.

On February 11, 1969, the trial court signed an order dismissing the order to show cause proceedings on the grounds of laches by the remaindermen. The order of the trial court was supported by a written decision.

On April 30, 1969, the remaindermen served notice of appeal. This court dismissed the appeal on the ground that it was not taken within the time prescribed by law. (1)

On January 21, 1970, and within one year from the date of the order dismissing the first order to show cause, the remaindermen procured another order to show cause. The order denying the January 21, 1970 order to show cause is the subject of this appeal. This second order to show cause also directed the trustee to show cause why the final decree and judgment should not be vacated and reopened and the orders approving the accounts and discharging the trustee vacated.

The second order to show cause was supported by an affidavit alleging the same fraudulent conduct on the part of the trustee as alleged in the affidavit in support of the prior order to

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(1) Sec. 324.04, Stats.

show cause. The affidavit also alleged that the dismissal of the prior order to show cause dated January 29, 1969, was procured by fraud upon the court, and that the trial court's decision on the first order to show cause was in error.

The alleged new grounds for relief in the affidavit in support of the second order to show cause are a series of allegations attempting to establish that the order dismissing the first order to show cause was procured by fraud upon the court. The allegations recite: (1) That in the affidavit of the vice-president of the trustee in support of the trustee's motion to dismiss the first order to show cause, it was alleged that all persons named as participants in the various transactions, which were the subject of the action, had since died; and that their testimony was important and essential to an inquiry into their conduct with respect to the transactions complained of; (2) that after entry of the order dismissing the first order to show cause, the vice-president of the trustee made certain statements which appeared in the newspapers on January 31, 1969, to the effect that the bank regretted that the allegations made against it could not have been heard by the court so that every allegation could have been proven to be false, and that "'. . . "(h)ad the matter not been decided on strict legal grounds, we would have proven that each of the allegations was false and the result would have been the same." ' "; (3) that these statements show that the element of prejudice, necessary to make laches a defense, was lacking; and (4) that the prior allegations of prejudice were false and made with the express intent of deceiving the court.

However, the trustee in the affidavit in support of the motion to dismiss the first order to show cause did not allege that a defense of the charge of fraudulent conduct was made impossible by the delay of the remaindermen, but only that the trustee would be seriously prejudiced in defending that charge because of the death of material witnesses. The trial court so found, stating:

> "The statement attributed to Edwin M. Greenthal is not inconsistent with the position of the Trustee that the defense was made more difficult because of the long delay by Elizabeth A. Braithwaite and Paul M. Kuder in requesting the relief sought."

Not only was the statement made after dismissal of the first order to show cause not inconsistent with the trustee's prior position that it was seriously prejudiced by the remaindermen's delay in defending the charges, but it is difficult to imagine how the optimistic statements could be taken as evidence that the prior assertions of prejudice were fraudulently made with the intention of deceiving the court.

In arguing this issue on appeal, it appears the appellants are endeavoring to argue the question of whether the trial court made the proper determination when it dismissed the first order to show cause, which was dismissed on the basis of laches. However, the question of laches as a bar was previously decided by the trial court in its order of February 11, 1969. Any error of the court in this regard should have been raised in an appeal from that order and may not now be raised. The allegations concerning the published

statements subsequent to the trial court's decision to dismiss the first order to show cause must be considered as an attempt to prove that the order of dismissal was procured by fraud upon the trial court.

We conclude that the language contained in the trial court's decision and order of June 30, 1970, constitutes a determination that the order dismissing the first order to show cause was not procured by fraud upon the court.

The trial court, in part, disposed of the second order to show cause on the ground of res judicata. We are of the opinion that the trial court could have reconsidered its first order of dismissal under authority of First Nat. Bank v. Kromer (1905), 126 Wis. 436, 105 N. W. 823; Paulsen v. Gundersen (1935), 218 Wis. 578, 260 N. W. 448; State ex rel. C W. Fischer F. Co. v. Detling (1938), 228 Wis. 68, 279 N W. 616.

In First Nat. Bank v. Kromer, supra, p. 440, the court stated:

> ". . . . The learned judge's idea that such orders, or one of them, left his court without jurisdiction to review any matter involved and decided in the prior proceedings is erroneous. A trial court under our system, so long as a case before it has not been closed by a final judgment, or if closed the time has not elapsed within which such court still has control thereof, may, upon a proper application therefor, correct errors of its own commission. . . .Of course, the trial court having once judicially closed a matter, after

giving such thought thereto that from the standpoint of the judge a reconsideration would not be liable to result differently, is well warranted in refusing to go over the matter a second time, though he still has full control of the litigation, but the doctrine of res adjudicata has no application to such a situation."

Once having determined that the order dismissing the first order to show cause was not procured by fraud upon the trial court, we are of the opinion that any further attempted appeal is in fact an attempt to appeal from the order dismissing the first order to show cause, which appeal has heretofore been dismissed by this court as being untimely.

In Fred B. Miller Co. v. Knebel (1919), 168 Wis. 587, 588, 589, 171 N. W. 69, this court stated:

"For more than thirty days after service upon him of notice of the entry of the order of March 6, 1918, no attempt was made by the receiver to give any notice of intention to appeal therefrom. By the order to show cause of April 24th he sought to have reviewed and modified the identical matter disposed of by the court by its order of March 6th, and the substance and effect of such latter order was no more than a repetition of that which had been done on March 6th. The first order, therefore, being in force and unreversed, concluded and determined the subject matter of the second order. Hoefer v. Milwaukee, 155 Wis. 83, 143 N. W. 1038;

Erin Prairie v. Wells, 158 Wis. 140, 147 N. W. 374, 148 N. W. 1095.

'Since neither the consent of parties nor action of the court can extend the statutory time for the taking of an appeal . . . such a result cannot be reached by the indirect method of again moving for the same relief that was refused in the prior order. The order of April 30th not being an appealable one and the time for appealing from the order of March 6th having expired, there is no appealable order before us. . . .' (Emphasis added.) See also: Hogensen v. Prahl (1926), 190 Wis. 214, 208 N. W. 867.

No appeal was taken from the prior order of dismissal. Except as to the allegations that the dismissal of the first order to show cause was procured by fraud, the present appeal is from an order denying the same relief denied in the prior order to show cause. The relief sought is based upon substantially the same grounds. Therefore, the order dismissing the second order to show cause is not appealable.

By the Court. -- Order affirmed.